SHOULD CONGRESS LEGISLATE

ON THE

SUBJECT OF RAILWAY RATES?

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The proper attitude to be assumed by the United States towards railroads engaged in interstate commerce is one of the most important legislative questions now pending. The transportation of commodities and of persons is the chief industry in the nation, employing the most men, demanding the largest current expenditure, and involving the greatest amount of capital. If there were no railways our present industrial and social conditions would not exist.

From the foundation of our republic it has been our national policy to encourage and develop all legitimate business enterprises. The taxing power and the police power of the nation have been steadily employed to this end. The American people are not unjust nor unwise; they know the importance of the services which have been rendered to the country by the American railway system and are proud of it; they would not knowingly permit its usefulness to be impaired or withdraw any right from its owners. But we have now reached a point where those exercising all other legitimate vocations are recognized as entitled to proper legislative protection while the catch-word applied to railroads is "regulation;" and when the popular idea of "regulation" is analyzed it is usually found to mean a reduction in rates. The legislative attitude towards railways has assumed the direction of repression and restraint. Suggestions made for the preservation of their constitutional rights are jeered at. Railway managers have been forced to pursue methods the furthest possible from their desire, both for the purpose of warding off attacks upon the rights of the owners of their properties and of conducting business under laws designed to make their business difficult.

The pretense of a desire to be just is always put forward, but the fact remains that results have been in one direction only. This tendency even colors the views of those who recognize the fact that existing laws are unfair and unwise, and we are told by them that in order to obtain relief from the present impossible legislative conditions still further concessions must be made. It is seriously asserted that railway rates and charges must be subjected to final control; that some outside power must always determine the price at which they shall sell their wares—for, in the final analysis, railways manufacture transportation and sell it to the public. The price to be charged is claimed to be subject to legislative control.

The railroad interests of the country have suffered greatly during the last five years. No such wholesale bankruptcies have occurred in any other industry. In no other kind of business enterprise has so much capital been swallowed up and disappeared. In no other vocation are the returns so trivial. The time has come for the reconsideration of fundamental principles.

There are two phases of this question of the so-called rate-making power, in respect to both of which laws have drifted away from landmarks. First, that of constitutional right; second, that of practical common sense. Or, to state the same questions interrogatively: First, Can the United States constitutionally nominate the rates upon interstate commerce? Second, Should the United States do so if the power exists?

I.

Notwithstanding that this power has long been assumed and that many decisions of the Supreme Court have proceeded on that assumption, nevertheless there has never been a square facing of the question by that tribunal. Much can be said in support of the proposition that the power "to regulate commerce among the several States and with foreign nations" does not include a power to fix the rates which shall be charged by common carriers transporting the subjects of such commerce. The word "regulate" as used in this section, has been the subject of much judicial construction and has been held to embrace many things. It has never yet been deliberately held to confer upon Congress a rate-making power, to be employed either directly or through the agency of a commission.

We may concede that Congress has the right to prevent unjust discrimination, to put an end to undue preferences, even to provide for actions at law to recover unreasonable and exorbitant charges—all of which may be said to be an extension by statute, to the courts of the United States, of the common-law jurisdiction heretofore possessed as to such matters by the courts of England and of the several States. But there is no such common-law jurisdiction of Courts to award the charges that may be made for future transportation. If Congress is to exercise administrative authority to that end it must produce a warrant under the Federal constitution.

In forensic arguments on this subject the word "regulate" is often spoken of as synonymous with "control," and the two words are often coupled together as though the true sense of the clause was thereby elucidated. But the Constitution does not use the word control. It uses only the word "regulate."

The question is, does the phrase "regulate commerce" confer upon Congress the power to fix rates; that is, prices upon future interstate transportation. We all know that commerce embraces many elements besides transportation. It includes the purchase and sale or exchange of commodities which are its subject, as well as their transportation. It comprehends the totality of that intercourse which constitutes trade in any and all its forms. (Welton vs. Mo., 91 U. S., 280.) If a power to fix prices is derivable from the word "regulate" in this section, it must apply as well to the sale and purchase as to the transportation of the subjects of commerce; and it is not perceived how any decision, founded upon such a definition of the verb, can stop short of including the price of cotton in its sale as well as the price of its transportation.

The question whether or not the particular industry in question is "affected with a public interest," made prominent in the Granger cases, so called, has nothing to do with the subject now in hand. Those decisions were concerning the powers of State legislatures, which are general legislative powers, except as *restrained* by constitutional prohibitions. The power of Congress must be *affirmatively conferred*, and if a power to regulate prices has been conferred by the phrase in question, it must apply to private business equally with business of a public nature—to everything that comes within the scope of the word "commerce." If not conferred by this phrase the power does not exist, whether the business be of a public or of a private nature.

Again, the power over rates and charges for transportation, said to rest in State legislatures, is made available (as against the legislative inviolability of contracts) through the reserved control found in the charters of corporations, which, since the Dartmouth College case, customarily provide that the legislature may alter, amend or repeal at will. Railroad franchises, with few exceptions, are State grants. The State gives them being. In effect they are the works of the several States, being constructed under their direct authority. (R. R. Co. vs. Maryland, 21 Wallace, 470.) But this reasoning does not support the power claimed for Congress. Its relation to the individual corporations is coupled with no system of parentage. So far as the Congress or the courts of the United States are concerned, each railroad company is a citizen of one or more States, and must be legislated about or impleaded as such a citizen, always under some express grant of a power to be found within the four corners of the Federal Constitution.

Looking at this clause historically, there is not the slightest question of the fact that no such power was understood to be conferred by the framers of the Constitution. This proposition might be supported by a long array of interesting citations, but as it has been repeatedly conceded by the Supreme Court of the

United States the details of its proof are unnecessary. One of the frequent illustrations of the difficulty to be corrected was found in the impediments put by the States in the way of commerce between New Jersey and New York City. No one suggested that the section would authorize a subsequent Congress to establish rates for this ferriage service, and the very idea would evidently have been abhorrent.

At the first session of Congress the duties on tea were adjusted at from 6 to 20 cents per pound, according to quality, when imported in American vessels; and from 15 to 45 cents per pound if imported in foreign vessels. The reason for this was thus explained in debate: "This tax is meant not only for revenue, but as a regulation of commerce highly advantageous to the United States." The word "regulate" was not used to signify control, restrain, repress. On the contrary, it meant promote, encourage, develop. The regulation of commerce with foreign nations was to be accomplished by the judicious employment of duties and imposts and by a common system of navigation laws. Its regulation among the several States was to be provided for by eradicating everything that might interfere with freedom of intercourse. "A power to prevent embarrassing restrictions by any State was the thing desired." (State Freight Tax, 15 Wallace, 275.) The thing granted was "the right of superintending the commercial regulations of every State, that none shall take place that shall be partial or contrary to the common interest." (Gibbons vs. Ogden, 9 Wheaton, 224.)

The Supreme Court has decided that the word "commerce" broadens with the progress of the times; that intercourse by telegraph for example, unknown in 1787, is within the protection of the commerce clause. In the regulation of commerce by sea Congress has taken full charge of the subject of navigation, defining what shall constitute American vessels, how registered, enrolled or licensed; has established rules of meeting at sea; also provisions for the health, safety and comfort of crews; inspection of boilers, etc. In these matters, as is said by Justice Field, in Sherlock vs. Allen (93 U. S. 99): "The commercial power conferred by the Constitution is without limitation. It authorizes legislation in respect to all the subjects, persons and instruments." In this, the broadest statement that has ever been made of the power conferred by the commerce clause, there is no indication of a power to control rates by the imposition of maximum or minimum charges. The existence of a power to prescribe sea-going rates has never been even squinted at by the Supreme Court, and Justice Field would have been the last member of that court to concede it. Yet, if Congress has power to prescribe rates for transportation in commerce between the several States, it has the same power concerning commerce "with foreign nations."

The first important act of Congress respecting interstate commerce was passed June 15, 1866. It authorized railroads, chartered by the several States, to combine with roads of other States so as to form continuous lines. This act has been called the charter of the American Railway System. Its object was to prevent the States from impeding commerce. "It was not intended to invade the domain of private contracts." (R. R. Co. vs. Richmond, 19 Wallace, 599.) This act was unquestionably within the constitutional powers of Congress.

For the purpose of the present argument it may be conceded that the Interstate Commerce law is also within these powers. At the common law the relations between carrier and shipper are those of a bailment, governed by the contract of affreightment which exists in each case. The common carrier must accept all freight that is tendered, of the kind and in the manner established by his usage. He is almost an insurer of the goods. He has a lien for his charges or may require payment in advance. He is bound to treat all patrons justly and without undue preference or unjust discrimination, and he is subject to an action for damages if he extorts an unreasonable rate. These features of the common law are the leading features of the "Act to regulate commerce," and jurisdiction for their enforcement is conferred upon the courts of the United States. The Commission established by the law is clearly an administrative body, rather than judicial, designed to stand as a kind of tribunal of conciliation between shippers and carriers. The method by which its "recommendations" gradually broadened into "notices" and "orders" need not be here referred to, for the final decision of each controversy is with the courts.

The transportation charge formulated in the railway tariffs is not a tax. Ingenious writers have so styled it, but the idea is wholly fanciful. Its origin is traceable to the public highway theory of railway service, the argument being substantially this: A railroad is a highway of commerce; the establishment of highways is a universally recognized duty of the State; hence railroads in their service are performing a governmental function as agents of the State. The State may impose tolls for the use of its public works; hence, the charges of railroads are assessed under the taxing power.

It is true that the railway is an improved highway; but the construction and maintenance of a railway is one thing, while the conducting of the business of transportation upon the railway is another. The old highway was the field upon which the common carrier entered and did his work. The transportation business has never been regarded as a function of government. It has of late years been assumed to some extent in monarchical countries, where capital does not readily combine and where military considerations control. There have been a few cases in countries subject to the common law where a State has both owned and operated a railroad, but never successfully. The duty of transporting goods and persons has never been assumed by the government of England or of the United States. The State provides roads where natural waterways do not exist, but leaves the carriage thereon to private enterprise and private contract. The transportation charge is remuneration for a service rendered. It involves the use of the highway, just as the carrier by wagon may have had to pay his tolls in order to pass along the turnpike, and in that case added them to his bill for carriage; but the business of furnishing roads is entirely distinct from that of furnishing transportation. The original railway charters contemplated common use by the public which was found practically impossible; a common carrier by rail is perforce conceded a monopoly over his particular route of travel, whether he owns it or leases it.

If carriers by rail are common carriers at all the relation between them and their shippers is necessarily a contract relation. The act to regulate commerce treats them as common carriers from the first line to the end. A railway freight bill is not a tax bill, and the price charged is not subject to nomination by the Federal Government upon any such theory as that.

Coming back to the Granger cases, which authorized State interference with local railway rates, we find that the authority there asserted resides in the Legislatures of the several States and not in the Federal Congress. This distinction is clearly pointed out by Chief Justice Waite. (Munn vs. Ill. 94 U. S., 124.) The court there held that the power to establish prices for transportation by common carriers existed in the several States not as a regulation of commerce, but as a power of government at common law, to fix the charges of bakers, hackmen, millers, innkeepers, ferries, wharfingers, common carriers, etc., because their business is "affected by a public interest;" a power inherited from the English Parliament by the State Legislatures, but not belonging to Congress unless openly conferred by the Constitution, except possibly as to the District of Columbia and the Territories (58 Fed. Rep. 858).

Thus, as we think properly, every consideration is eliminated save the naked definition of the phrase, What is it to *regulate* commerce? When we once depart from the idea entertained by the framers of the language the field opened is a broad one, but we think a clear and just limitation can be defined. The clause must be construed so as to harmonize with the fifth amendment, which restricts the powers of Congress, much as the powers of States are restricted by the fourteenth amendment. In regulating the *subjects* of interstate and foreign commerce, we may concede a right to promote the exchange of commodities, when deemed desirable for the common good, and to suppress the exchange of such as are dangerous to life, health or the general prosperity; but not to forbid traffic in legitimate property, such as the necessaries of life, its comforts and its luxuries. In regulating the *persons engaged in* commerce, we may admit a right to examine and license shipmasters, engineers, etc., for the safety and protection of all concerned, but not to exclude any citizen or designated class of citizens from the purchase of a seaworthy ship, or of wagons, or railroads, or their employment in commerce. In regulating the *instruments* of commerce we may allow the existence of power to supervise the physical operation of vessels, railway trains, etc.; to see to it that brakes are continuous, ship boilers safe and life-boats ample. But when we come to the matter of contracting for services to be rendered we find that property, by the fifth amendment, is as sacred as life and liberty, and that any common carrier tendering his facilities to the public may make his price what he will, subject to his responsibility in the courts for damages if he commits unjust discrimination or extortion.

There is grave question respecting the constitutional power of Congress to prescribe future maximum rates, enforceable by injunction. This because:

First. No such power was contemplated by the framers of the Constitution.

Second. The Constitution has not yet been so construed by the Supreme Court.

Third. The words "regulate commerce" do not imply its existence on any fair construction of their meaning.

Fourth. Such a construction would interfere with and destroy rights of property, assured by other clauses.

Fifth. The clause cannot be so construed without involving the power to regulate the rates to be charged by vessels engaged in commerce with foreign nations, and also prices generally in commercial transactions.

II.

Supposing, however, that the right to fix future railway rates upon interstate traffic has beeen constitutionally delegated to Congress in such manner that it may be exercised either directly or through a commission, is the exercise by Congress of such a power desirable or wise?

In the first place, it should be noted that if Congress can confer such a power upon a commisssion it can exercise it directly by Act. To see where this would lead us one or two concrete cases out of thousands may be suggested. Suppose a member from Georgia should introduce a bill to reduce the rate on marble to 25 cents per hundred pounds from points in Georgia to Chicago, and suppose also that the rate on marble from Vermont to Chicago is 50 cents per hundred pounds. The proposed reduction would shut out Vermont marble from a large part of its present territory. New England would naturally rally to the defense of Vermont, and the rate on marble would become a political issue, with locality arrayed against locality, with bargains to be made, with personal interests to be promoted. Or suppose again that the rate on lumber from Wisconsin and Michigan points to Kansas and Nebraska should become a matter of Congressional legislation as compared with lumber rates from Arkansas, Louisiana, Mississippi and Oregon to the same territory. Or suppose a bill should be introduced to prevent railroads from transporting oranges from California to New York at less than $1.50 per hundred pounds on the ground that such transportation has a tendency to injure the orange growers of Florida; or to reduce rates from both States in order to exclude fruits from other countries. Such examples need not be multiplied. There is no citizen who would not deprecate the introduction of such questions into the halls of Congress. Nevertheless, such legislative experiments are in sight if we once concede the propriety of Congressional legislation upon railroad rates.

The Interstate Commerce law as passed in 1887 did not confer any rate-making power upon the Interstate Commerce Commission. At the time of its passage no one supposed that it did. The enactment of that law was preceded by long investigations conducted by successive committees. The report of the last (Cullom) committee undertook to formulate the then existing "causes of complaint against the railway system." Eighteen complaints were scheduled, for the correction of which Congressional action was proposed. They covered the subjects of the relation of local rates to through rates, unjust discriminations, rebates, secret rates, fluctuations in rates, overcharges, misunderstandings through varying classifications and otherwise, passes, wasteful management, etc. No complaint was stated in respect to extortionate rates. No substantial complaint exists on that subject to-day.

But we are not left merely to the negative inference thus indicated, in determining what was intended in the passage of that law. The Senate committee, after scheduling complaints, proceeded to state that their essence was unjust discrimination, "This is the principal cause of complaint against the management and operation of the transportation system of the United States." Then, after a careful discussion of what discriminations may be justified and what discriminations must be regarded as unjust, their report contains the following sub-head: "Fixing of rates by legislation impracticable."

This proposition is argued at length, and established to the satisfaction of the committee—and, I may add, of everybody else. The statement is made that "it would be inexpedient and impracticable to attempt to adjust existing inequalities by any system of rates established by legislation," which proposition is developed fully.

Finally, after discussing many other matters foreign to the present subject, the committee concluded its able report by an explanation of "The Committee's Bill," stated as representing its substantially unanimous judgment. "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose or aim of the measure is the prevention of these discriminations both by declaring them unlawful and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to the rates, financial operations and methods of management of the carriers."

The bill thus described became the Interstate Commerce law—the short-haul and anti-pooling clauses being afterwards unfortunately added by the House. It was not intended to authorize the Commission to name rates and it scrupulously omitted to confer any such authority.

The Commission itself was at first in harmony with this view of the situation. It disclaimed authority to nominate rates; but later on the views of Commissioners changed. In the absence of a power to say what should be a reasonable rate they found themselves unable to accomplish results which they seemed to think desirable, and began to cast about to discover whether after all the desired authority had not been unwittingly conferred. They issued "orders" requiring carriers not to charge in excess of rates named by them as reasonable and also to make reparation for charges paid in excess of such rates. And after several years of laborious genesis, the Commission developed in its annual reports a theory under which it attempted to justify itself in respect to various litigations which it had instituted and was conducting in the courts against certain railroads to compel them to put in effect a series of tariffs which that body had formulated for the transportation of different commodities in various parts of the country. Its reasoning was substantially this: The Commission has found that a certain rate discriminates unjustly, or that another rate is excessive. It is necessary, in order to make our finding effective, that we go further and say what rate would be non-discriminative or what sum would be reasonable and just.

Could anything be clearer? And yet, the roads persisted in defending the litigations, and now the Supreme Court has finally decided that the roads were right and the Commission was wrong, and that no authority to nominate rates was conferred on the Commission by the Interstate Commerce Law.

The law has thus been brought back to its moorings and has been decided to mean precisely what everybody understood it to mean at the beginning. The same history has occurred in respect to the short-haul clause and other provisions of the law. Thereupon the Court is accused of having weakened the law by interpreting the life out of it, of having riddled it, of having left but a skeleton, and all that sort of thing. In fact, the Court has simply corrected erroneous interpretations of the statute, and has rebuked efforts to read into its language powers that were never intended to be conferred. Aside from the short-haul and antipooling provisions, the Interstate Commerce Law was a well-considered and useful statute; but a little authority naturally leads to the effort to secure more, and it is not the wise judge alone who seeks to amplify his jurisdiction.

It seems that the railroads are now to expect a new attack. Clamor has been raised that the Supreme Court, by construction, has emasculated the statute, and that Congress must forthwith confer all the powers which the Court has said are not at present given. To speak more concretely in relation to the present subject, it is demanded that the power to make rates be now conferred upon the Commission.

But why? Let us look at the matter seriously. What has occurred since 1887 to make this proper legislation for Congress to undertake? If it was not then expedient or practicable, is it expedient or practicable now? Have railway rates advanced since 1887? Has extortion been committed? Have we not the lowest rates in the world? Have not bankruptcy and reorganization been the almost universal experience of railroad companies?

But, some one says, when unjust discrimination is charged the Commission should have power to say what reduction is required to overcome the discrimination, if its existence be established. This power would no doubt gratify the Commission, but is there any other valid reason for granting it? The injured party has a right of action, the same as for any other pecuniary injury; even more, for he may elect between proceeding for damages or for restraint; and the Commission may not be infallible.

This question is of infinitely broader scope than is conceived by those who treat it as such a simple matter. There are two ways in which railroads may be managed; one is the bureaucratic method of countries having State railways, in which competition is set aside so far as possible by divisions of territory and of traffic, and rates are named upon somebody's idea of what was thought proper when the roads were opened. The other is the competitive system, under which varying competitive forces determine from time to time the maximum rates that can be charged, and the desire to attract business reduces these maxima freely. The latter system is that of countries subject to the common law. To go over to the bureaucratic system is contrary to the spirit of our institutions; it is worse than that, for it would endanger our national progress. Under rates controlled by competition our country has expanded and developed beyond what any other nation would think credible. Rates have been constantly reduced, and doubtless the flexibility of rates in their adaptation to business conditions and the continual opening of new enterprises, channels of trade, and markets have been largely due to the fact that no bureau has supervised railway traffic.

It is without doubt true that railway rates are now much lower than they would have been had a public rate-making body been established twenty years ago; and in this view it may be said that the creation of a rate bureau would be a protection to the revenues of the roads. This may be so; but railway officials do not desire a protection which would prevent them from constant efforts to develop the traffic of their respective lines.

It would be a sorry day for our country were a rate-making power given to any possible tribunal. Its mere existence would threaten all energy and enterprise. Its exercise would either overturn competitive conditions, which would be ruinous, or it would acknowledge them, which is the present system.

In other words, the rate-making authority must either recognize the competitive forces applicable to the situation or must ignore them. In the first case no interference is needed. The second alternative would be contrary to the genius of our institutions, and disaster would inevitably ensue.

Except in nations where the State manages the railroads, transportation charges by land and by sea are regulated by competition. State ownership would mean high tariffs and retarded commercial progress; competition is the safe governing force in respect to all contractual matters. While it is true that excessive competition must be regulated and ameliorated in order that each competitive agency may preserve an independent existence, such regulation will come from within unless prevented by unwise laws. On the other hand, competition has ample strength to overthrow combinations designed to unduly restrict its freedom. As a practical proposition, it is undeniably true in this matter as in many others that too much government is attempted. Instead of more laws there should be fewer laws. Competition is a natural force; like other forces of nature, it will do its best work when let alone.

To attempt to fix transportation rates upon the interstate commerce of the United States by any possible vis major that can be devised for that purpose, would be to substitute a narrow, fluctuating, human view of what justice may be thought from time to time to require, for the broad, persistent, dominating conditions which competition will forever create and preserve.

It may be said, however, that it is not at this time proposed to discard competition as a regulative force, but to leave it in full play and, in addition, give authority to the Commission to make further reductions in cases where the reductions forced by competition do not seem to them sufficient. This proposition is seriously made, but nothing could be more unjust to railway interests or unwise on the part of the public. Unjust, because the revenues of the carriers are now depleted by the action of natural forces so excessive as to require restraint, not reinforcement; unwise, because the public would in the end bear the burden through impaired service, business calamities, reduced wages, and all the reactions that invariably follow the doing of injustice.

We may look to the past to learn just what this scheme proposes. Most of the cases in which the Commission, in the previous misconception of its powers, has undertaken to name a rate which should not be exceeded have been occasions where the real difficulty was excessive competition. For example, the lumber rates in the Northwest; an order was made that a certain railroad should not charge above a certain rate, amounting to a reduction of two or three cents per hundred weight. The road in question was quite willing to make this reduction, hoping thereby to increase its tonnage; but its competitors, who were carrying lumber from other points to the same market, at once reduced their rates by the same amount, so that the shippers by the first line got no relief, while the railroad was robbed of its revenue without any useful purpose being subserved. This was a case where the Commission undertook to correct what it considered to be an unjust discrimination. But does not the result prove that in fact there was no unjust discrimination? If a certain condition is forced by competition, even though upon inspection of distance-tables and tariffs it appears to be unnatural and unfair, the State may safely assume that the apparent discrimination is the result of inherent disabilities on the one hand or advantages on the other. Competitive forces are too intricate and delicate to be controlled by the insertion of a crowbar here and there. There are many apparent evils in the world which benevolence is unable to assuage. We must determine such general lines of policy as are likely to promote the greatest good of the greatest number. In the matter of railway rates there can be no possible question that the true policy consists in remitting their control absolutely to natural laws without interference by State or Nation.

III.

In view of the fact now generally conceded, that the prohibition of pooling was unwise and has prevented the obtaining of many good results hoped for from the passage of the Interstate Commerce Law, it seems probable that Congress will be compelled to authorize pooling agreements as an aid to the regulative statute. The prohibition of pooling made unjust discrimination inevitable on the largest possible scale. But in connection with the proposal to correct this admitted mistake it is said that rates should be subjected to absolute and effective control. This proposition issometimes presented as though the railroads were being granted a favor, in consideration of which a concession should be extorted; whereas the legalizing of pools is for the benefit of shippers as much or more than of the railroads. At other times it is said that pools will destroy competition, and unless rates are controlled they will become excessive; to which there are two answers: first, pools will not destroy competition; second, excessive rates cannot be exacted. History and the testimony of experts proves that while pools tend to regulate competitive excesses, they do not and never can efface legitimate competition, or even seriously weaken its vitality. The making of excessive rates is no longer practically possible in the United States. It is an entire fallacy to suppose that the rate to be charged on any given traffic is subject to the decree of the railway traffic manager or even to the decree of groups of traffic managers. They can reduce rates, but except in rare and peculiar cases they cannot make them higher than the maxima forced by competitive conditions, which control railway rates in substantially every corner of the land. And the rare and peculiar cases will either presently correct themselves or can be corrected through existing machinery to that end.

The fundamental proposition that the naming of rates for future use upon interstate railway traffic ought not to be made a subject of Congressional legislation should be unhesitatingly accepted.

A very practical phase of the present situation must, however, be considered. It concerns the form that may most judiciously be given to legislation in the present Congress.

The present difficulty arises from two sources: First, the existing indisposition in legislative chambers to concede to the railway system of the country the fostering care which is bestowed freely upon all other industries, or to give even slight consideration to the requirements of justice in their behalf; second, the apparent inability of those who recognize the necessity of action of some kind to understand clearly the conditions of the case, and their unwillingness to act, as they would do in other matters, upon the opinions and testimony of those familiar with the practical management of railway transportation.

I have spoken of present legislative conditions as "impossible." . This word is used in all seriousness. It has been held that the Anti-Trust Law forbids railroads to use the only practical method for doing the things which the Interstate Commerce Law commands. And it is an admitted truth that the Interstate Commerce Law seeks to enforce competition by the mandate of the statute, and at the same time punishes as criminal misdemeanors the acts and methods by which competition is ordinarily effected. The result, as has been tersely stated, is that in many localities and with reference to many commodities, a man who obeys the statute law can "neither operate a railroad nor ship over a railroad."

This is the pass to which this industry has been brought by inconsiderate legislation. Practical and commercial conditions have been ignored. Contradictory laws have been enacted. Prompt Congressional legislation is absolutely required.

This action must cover two fundamental points. First, the Anti-Trust Law must be so modified that railroads may act together in performing the requirements of the Interstate Commerce Law; second, the Interstate Commerce Law must be so amended that railroads may apportion the earnings of common traffic, and thus make possible the elimination of unjust discriminations from the transportation service. Under past arduous conditions the railroads have diligently though often vainly attempted to conform to legal requirements through the agency of voluntary associations. Railway managers sincerely desire to operate their properties in conformity to law. The law requires that all rates be fixed and published, and uniform rates are conceded to be an absolute necessity. This work has been one of the functions of the associations which the Anti-Trust Law has been held to suppress. Their other function has been the prevention of unjust discriminations; or, in other words, the maintenance of rates as published, neither more nor less. This has been accomplished at times for shorter or longer periods; it cannot be successfully and continuously accomplished unless supported by the apportionment of common traffic or its earnings; hence the necessity for the legalization of contracts for that purpose.

The necessary legislative requirements cannot be understood without keeping clearly in mind the two points above distinguished. Railways must associate and mutually weigh all competitive conditions in order to fix uniform rates; they must associate and apportion certain sections of their traffic in order to maintain the rates so fixed.

While both these functions are usually covered by the same association agreement they are absolutely diverse, Pooling is not an agency for the fixing of rates, but for maintaining rates; not maintaining the standard of rates, but maintaining the actual rates, which necessarily fluctuate from time to time in accordance with competitive and business conditions. Rates may vary every day and yet be strictly "maintained."

In their best estate associations agree upon rates, by mutual consent if possible, but preserving to members the right of independent action. Every change is made in view of competition, and business conditions within and without the territory affected—perhaps more frequently without than within; the competition can never cease; and the establishment of rates will inevitably and always be dominated by natural forces, which may be depended upon to keep the rudder true, but which if interfered with will inevitably precipitate distress and disaster. In their other aspect associations, by apportioning the business carried under rates so controlled, enable the rates to be steadily and uniformly applied to all shippers alike, whether the figures fixed go up or go down.

Rates are "fixed" (or the amount thereof determined) under conditions beyond the control of the carriers. The figures must be fought out and registered in meetings held for that purpose. Arbitrations are often necessary. Without such machinery the only result possible is a series of rate wars ruinous to all interests and the ultimate collapse of the entire railway system. Each traffic manager always secures for his line the lowest rates that can be made without inducing reductions of the rates of other lines competing for the same traffic, or competing for like traffic to the same market.

Rates are not "fixed" by pools, and they never were. On the contrary, while pools were formerly in vogue, from 1865 to 1888, the rate per ton per mile on six leading Eastern roads decreased from 2.900 to .609, and on six leading Western roads from 3.642 to .934. The function of pools is simply to assist in assuring the public that each carrier will stand by the "fixed" rate until changes are made through methods which will disturb business the least possible.

It is, of course, possible that rates may occasionally be "fixed" on a higher basis than would be adopted if their maintenance was not to be supported by a pooling agreement; but this will rarely if ever be done except in cases where unreasonable reductions have previously occurred and where the results of excessive competition demand correction. Stability in rates is of infinitely more importance to the public than too low rates; and as a practical matter extortionate rate charges cannot be maintained in the face of present corrective influences and agencies. Pooling can never be the panacea for all existing ills of the railway service which some of its advocates seem to expect, but it will undoubtedly ameliorate the vices of excessive competition which its prohibition induces, and almost compels.

It has lately been deliberately stated, and very likely it is quite generally believed, that "the purpose of a pooling law is to eliminate entirely from railway operations with respect to the traffic which it affects the factor of railway competition." It is difficult to argue with those who entertain such a belief as that; its mere statement shows how remotely they apprehend the true conditions. It would be easy to refute it by illustration and experience if time and space allowed. As well might a coffer-dam be expected to subdue the waves of the ocean.

The fact important for present consideration is this: That a feeling exists and may be regarded as quite generally prevalent that railways desire to pool their traffic earnings in order to secure and perpetuate higher standards of rates; or, at least, to avoid the further reduction of existing rate standards through the effacement of competition. It is useless to explain that the object of pools is to provide a basis by which railroads may overcome the illegitimate competitive methods which the Interstate Commerce Law forbids. It is futile to point to the vast reductions in rates accomplished while pools were formerly in use. It is idle to show that pools can never reach to the inclusion of every competitive factor, or to point to the fact that the competition of markets cannot be extinguished by any action that may be taken by common carriers; no one seems to remember that pools at best are formed with difficulty and are of brief duration, every member hoping for increased percentages at the next allotment and striving in a thousand legitimate ways to increase the earnings of the various lines. No attention is given to explanations of the difference between legitimate and illegitimate competition; between competition which is useful to the public and that which is disastrous; between competition which obeys the law and that which ignores and overrides it. It does no good to show that excessive competition is an enemy to human progress which, unless restrained, results in monopoly through the extinguishment of competitive agencies. When the human mind is once set upon the adoration of the fetich of "free and unrestricted competition" reasons fail to impress and facts disappear from view. Even the Interstate Commerce Commission in their recent Annual Report, while expressing a majority opinion that pooling would "occasion some improvement in the rate situation at almost all points and might altogether amend it at many points," adds the assertion that "If pooling produces any beneficial result it does so at the expense of competition;" without noting that it is excessive and illegitimate competition which pooling aims to curb; and then follows this most remarkable assertion: "It is only by destroying competition that the inducement to deviate from the published rate is wholly removed, and it is only to the extent that competition is actually destroyed that beneficial results can be expected."

Destroying competition, forsooth! As if competition between railroads can ever be destroyed so long as separate ownership and management exist! The keen edge of reckless and illegitimate competition between the railroads of the United States to-day may to some extent be dulled, its excesses may be ameliorated and somewhat held in check, by agreements to participate upon agreed shares in the carriage of common traffic, but talk of the destruction of competition is too absurd to be taken seriously. Competition carried to excess may destroy itself by bringing on the successive ruin of the individual competitors, but it will never be destroyed by any system of internal regulation provided by the competitors themselves, intended to preserve the individual existence of each competing element.

Nevertheless, we have the clamor and the threat, and must face the situation as it is. The spectre of a gigantic railway trust is lifted on high by men who should know better, and the public is duly terrified at the fearful vision. The enactment of a pooling bill, says the Commission, "would be little better than a crime unless this tribunal or some other tribunal is at the same time invested with adequate powers of control." Very good; control need not be feared where no injury to the public is contemplated. By all means let the Commissioners have all the control that can properly be conferred upon them.

But when we come to consider the forms of control proposed, much more is asked than can properly be granted. Shall association agreements containing pooling features be filed with the Commission? Yes, certainly. Such agreements are filed with the Commission as a matter of course, and thereby become public records. Shall the Commission have the power to examine them before they become effective and to turn them to the wall if they so decide? Certainly, if this is desired. At first the Commission protested that it wanted no such responsibility as that; but times have changed, and the Foraker bill now pending in Congress authorizes the Commission to disapprove any agreement if of opinion that its operation "would by reason of its provisions or for want of necessary restrictions and limitations result in unreasonable rates, unjust discrimination, insufficient service to the public, or otherwise contravene any of the provisions of this act." This is certainly broad enough as a preliminary to the taking effect of the agreement. Assuming the agreement to have passed this preliminary inspection and become operative, the proposed bill makes it the duty of the Commissioners to observe the working, operation and effect of every such contract, to make examinations and investigations as deemed necessary, to investigate all complaints; and confers power upon the Commission to make an order disapproving the contract and requiring it to be terminated if it finds cause for so doing. It is the obvious purpose of these provisions to give the Commission complete and final control over pooling contracts; control over their inception with power to prevent them from going into operation, and control over their existence with power to declare them "unlawful" at any time. These provisions certainly appear adequate to protect the public. It is felt by railway managers that such conditions as these may properly be made, in granting the opportunity which they desire to practically demonstrate the truth of their belief that such contracts will be found useful to the public and an aid to the regulative statute.

But the Commission desires something far beyond what has been described above. The Commissioners seek to make this honest effort of the railroads to put their business under the control of a workable law an occasion whereby they may grasp and forever hold the power which decisions of the Supreme Court have recently denied them. This is not an overstatement of their position. Their words are as follows, referring to the powers of control, without which they say the granting of a pooling privilege would be little better than a crime: "Nothing less in degree than those outlined in this report or their equivalent would be adequate."

The powers outlined in the report and submitted to Congress for adoption and approval cover all that the wildest advocate of a bureaucratic system could desire. It is not proposed to recapitulate them. It is sufficient to say that they would confer upon the Commission absolute power over all interstate railway rates. Not simply over the rates upon the traffic subject to the proposed pooling agreements, which might be conceded as a trade, though of itself would be an unreasonable demand because such a concession would not be cognate to the grant; the contract being the thing granted and over which absolute power is intended to be given. But power over the rates upon all traffic subject to the law. The power desired is the most enormous ever conceived by human intellect. It is now exercised through the agency of thousands of experienced men, each representing not only the interests of his line, but of the customers of his line, whose increased business is also his increased business. It is subject to the control of general laws, as above pointed out, and also to the domination of all manner of competitive forces of carriers by land and by water, of manufacturers and producers from every point of the compass, of markets in this country and throughout the world. For this arrangement it is calmly proposed to substitute the judgment of five men, of three if the five do not agree, trained as lawyers, representing five localities only, with power to ruin industries, to boom towns, to "determine whether the Kansas farmer shall burn his corn for fuel or send it to the market;" and with power at the same time to make or break every railroad corporation in the land, to send any railroad stocks or bonds up or down in the stock market, to control importations of every kind and to limit all exportation (which, by the way, is involved in rulings already made by the Commission), to exclude Baltimore or Boston or any other city from the transaction of export business by changing existing differentials, to array North against South and East against West by overturning conditions established by competition and substituting therefor the decree of the rule of thumb; in fact, to absolutely dominate this land of ours with the power of pagan consuls.

This is no fancy picture. The amendments proposed by the Commission give them power upon complaint filed to make what they would like to call an "administrative order," determining "what are and will be reasonable and otherwise lawful rates, fares, charges, classification, privileges, facilities or regulations." These orders may be enforced in the courts, with restitution of all charges made at the old rate after the complaint was filed; and the carriers are to have the right to appeal to the courts upon the Commissioners' record, with no right, however, to recover costs on such appeal. If the order is vacated the Commission may make a new order on the same record. Other provisions authorize the Commission to fix maximum and minimum rates, to determine the division of joint rates, to make changes in classifications, and to amend the rules and regulations of the carriers. The authority proposed is adequate to cover every question that may arise in respect to future railway rates. The list given by the Commission of cases now pending and of matters previously heard by them shows the scope of the questions which they ask authority to decide. As an example, may be cited the adjustment of freight rates to the Southern States, from Eastern as against Western cities, and many other questions arraying one section of the country against another. In the face of these proposals the position of the roads becomes exceeding difficult. Of course, the idea of granting them should not be seriously entertained. Yet our thoughts return to the existing laws under which an honest man cannot do business. The true way out of this dilemma is for Congress to pass such amendments to the present statutes as are necessary and wholesome, and to do no more. The amendments above outlined, coupled with such powers of control as may properly be attached thereto, will be found not only beneficial to the carriers, but also to shippers and receivers of goods and to all interests affected by the proper operation of the American railway system.

Aldace F. Walker

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